IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 2140 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHRI PRADEEP RAMSUBHAG TIWARI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :

MR MR PRAJAPATI for Appellant,

MS.PANDIT, ADDL.PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 31/07/2007

ORAL JUDGMENT

The appellant has preferred the present appeal challenging the legality and validity of the judgment

and order of conviction and sentence passed by the learned Additional Sessions Judge, Fast Track Court No.17, Ahmedabad City, on 17th June, 2005, whereby the appellant-accused has been held guilty of the charge of offence punishable under Section 394 read with Section 34 and under Section 397 of the Indian Penal Code. The appellant was sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.5,000/-, in default of making payment of fine, to undergo simple imprisonment for one month. The appellant-accused has been also held guilty for the charge of offence punishable under Section 135 of the Bombay Police Act but no separate sentence was awarded for the said offence. The appellant was also given the benefit of set off the period during which he was remained in judicial custody.

2. On careful reading of the operative part of the impugned judgment and order, it appears that there is some confusion as to the scheme of Sections 394 and 397 of the Indian Penal Code in the mind of the learned trial Judge, but considering the settled legal position, it is possible for this Court to say

that no sentence was required to be awarded to the appellant-accused for the offence punishable under Section 394 of the Indian Penal Code being a minor offence than the offence punishable under Section 397 of the Indian Penal Code. As such, in the entire impugned judgment and order there is no discussion as to publication of Notification which requires to be published under the Bombay Police Act. None of the Police Officer has stated in their deposition that Notification under Section 37 (1) of the Bombay Police Act was published or it was properly published. Even, neither a copy of such Notification was put on record so there was no scope for the learned trial Judge to held the accused guilty of the charge of offence punishable under Section 135 of the Bombay Police Act or in not making distinction between the two offences, that is, offence punishable under Section 394 and under Section 397 of the Indian Penal Code. However, it would not make the ultimate order of conviction either bad or illegal and this Court while exercising powers vested with it under the provisions of Section 384 read with Section 386 of the Code of Criminal Procedure can appreciate

and / or re-appreciate the evidence and decide as to whether the prosecution has successfully established any of the charges that were framed against the accused.

3. To appreciate the rival side contention, it would be beneficial to state the case of prosecution in brief and for this purpose the Court is inclined to reproduce the relevant part of the charge that was framed against the appellant-accused because the same is the substratum of the case of prosecution.

> "That on 18th February, 2003 at about 2:00 a.m., in the morning, the complainant-Jagrupsinh Amarsing Jant parked his truck in front of weigh bridge situated opposite to Nagarvel Hanuman Temple, Amraivadi, Ahmedabad and while, after collecting Rs.10,000/- and documents papers from the Office of the Agent, he was boarding the truck opening the door of the truck, you accused alongwith other absconding accused, with an intention to loot the complainant, gagged the mouth of the complainant, dragged him near the lane of Jyoti High School, assaulted him on left back side, left side of the chest, under arm of the left hand, left and right hands, so also, on the left side chick and caused him serious injuries and thereafter looted his wallet containing Rs.1,000/- to Rs.1,200/- so also, a

bundle of Rs.10,000/- and driving licence. That you accused also administered threat to the complainant twice by saying that you accused would kill him and thereafter you all accused ran away from the spot and thereby committed offences punishable under Section 34 and 114 read with Section 394, 397 and 504 of the Indian Penal Code and also under Section 135 (1) of the Bombay Police Act."

4. There is enough force in submission of learned A.P.P., and therefore this Court obviously shall have to deal with the submission that have been advanced by Mr.Prajapati. According to Mr.Prajapati, the learned trial Judge has wrongly held the accused guilty. He has made elaborate submissions taking this Court through the oral as well as documentary evidence led during the course of trial. The sum and substance of the argument of Mr.Prajapati can be divided into three major parts.

4.1 The first point placed by Mr.Prajapati is that there is no direct evidence against the accused. It is not the case of prosecution that the accused was identified at the time of robbing and inflicting injuries with knife. The incident occurred at 2:00

a.m., and there may not be sufficient light. On the contrary, it should be inferred that there must be darkness around the truck where it was parked. An identification of the accused in the Court for the first time ought not to have been considered as good and reliable piece of evidence in absence of conduction of test identification parade. It was possible for the Investigating Officer to arrange for test identification parade of one the accused-Akhilesh who was escaped from the police custody after some days of his arrest. So, test identification parade ought to have been arranged by the Investigating Officer for both the accused persons (present appellant and absconding accused). It is not even the case of the complainant in the F.I.R. (Exh.11) that he can identify the accused, if they are shown to him. The learned trial Judge has grossly erred in accepting the version of the complainant whereby he has identified the accused in the Court during the trial.

4.2 The second point placed by Mr.Prajapati is that none of the Panch Witnesses of the Panchnama

drawn by Police qua discovery of muddamal knife, has been examined and the evidence of Police Officer, Mr.Patil, who claims to have drawn this crucial Panchnama ought not to have been accepted as gospel truth. On the contrary, this Court should observe that the Panchnama and other documents proved and produced before the Court ought not to have been looked into as reliable piece of evidence. The Court have deprecated the joint discovery Panchnama and the description given by P.W.No.5, Mr.Patil about the events occurred at the time of drawing Panchnama looks most improbable and therefore no weightage should be given to the evidence collected in nature of discovery of the muddamal knife. According to Police, article No.1 sent for analysis to F.S.L., was discovered by the present appellant-accused. As per basic story of the case of prosecution three persons have robbed the complainant and two of them had inflicted injuries with knife. There was no investigation as to the third person till the trial was concluded against the accused and one of the accused who was arrested simultaneously, that is, Akhilesh Vasant Verma, escaped from the police

custody. In such a fact situation, the recovery or discovery of muddamal knife should not be given any weightage to link the accused with the crime. It is relevant to note that no blood stains were found on the clothes of the accused, as it was found on the clothes of the absconding accused-Akhilesh Verma. This directly indicates the false implication of the appellant-accused as he was in the company of the absconding accused at relevant point of time when he was arrested.

4.3 The third point argued by Mr.Prajapati is that evidence as to recovery of muddamal photographs and wallet of the complainant from the appellant-accused, is most unreliable piece of evidence. The Panch has not supported the case of prosecution and it would not be safe for the Court to place reliance on the evidence of the Police Officer. Rs.9,750/- were recovered from the absconding accused, so there is ample scope that entire muddamal may be with the absconding accused but only with a view to implicate the present appellant-accused in the offence, some articles have been shown to have been recovered from

the custody of the appellant-accused. According to complaint, the complainant was robbed and Rs.10,000/- which was with him and another amount of Rs.1,000/- + Rs.1,200/- which was in his wallet were looted. The driving licence was also with the accused and Police has recovered this driving licence from absconding accused, so recovery of some miscellaneous papers, eight photographs and wallet from the appellant-accused should be viewed with doubt. The accused were not intercepted or arrested immediately. According to prosecution they were arrested on the date of incident but during night hours, between 20:30 and 21:30 hours. So after a gap of more than eighteen hours the accused was not even suspected, as no injury was found on his body and therefore the Police has no reason to arrest him. The Court should consider this crucial time gap of eighteen hours and also time gap between the arrest and recovery Panchnama of muddamal knife.

4.4 Fort short according to Mr.Prajapati there is not any legal or adequate evidence to link the accused with crime. The learned Judge has committed

grave error in appreciating the evidence and accepting the evidence of Police Witnesses. The injuries that were found on the body of present complainant, of course, are the injuries which can be inflicted with sharp cutting instrument like knife but none of the injuries can be said to be a grievous hurt. So, the learned trial Judge ought not to have held the accused guilty for the charge of offence punishable under Section 397 of the Indian Penal Code.

5. Ms.Pandit, learned A.P.P., has submitted that the case of prosecution does not rest only on the identity of the accused. The prosecution has placed reliance on other circumstantial evidence and the Court should appreciate the evidence as a whole. Merely, because of certain witnesses are examined by the prosecution who are Police Witnesses, their evidence should not be ignored. There was no reason for Police to falsely implicate the accused in such a serious offence. The accused is not an habitual offender or a person known to Police. It is in evidence that the Police was in search of serious

offence committed during early hours of the day and one of the accused, that is, absconding accused was having some minor injury which was visible and his clothes were also stained with blood. The Police had looked at him with suspicion and immediately thereafter the absconding accused as well as present appellant on seeing the Police had attempted to escape from the spot and started running away but, they were intercepted, caught and thereafter interrogated. On this point the Police Officer who intercepted both the accused persons was the only reliable person available for prosecution to prove its case. Ultimately, his version before the Court was taken to the test of cross-examination and therefore the learned trial Judge has rightly believed the say of Police Officer (P.W.No.4) that when this Police Officer was on duty, on suspicion and on account of conduct of the accused persons, he intercepted and arrested both the accused persons and the convict (appellant) is one of them. Of course, the Panchas have not supported him but the details narrated by this Police Officer in the Panchanama gets corroboration from the muddamal receipt prepared

by him and the list of muddamal article sent by him for F.S.L. Examination. It is true that conduct of the absconding accused-Akhilesh Verma is not binding to the convict but this Court should also consider that there was no reason for the convict to run with the absconding accused-Akhilesh Verma. This conduct of the convict is a guilty conduct. An innocent person would not start to run only on seeing the Police, that too, alongwith the person having blood stained on his clothes.

6. The recovery of eight photographs of the complainant alongwith some papers and wallet from the person convict, is a minor piece of evidence. Three witnesses were available to prosecution. Two of them were Panchas and one was the Police Officer, who has drawn the recovery Panchnama of the articles recovered from the convict-appellant. The Panch has not supported the case of prosecution but when wallet has been identified by the complainant in the Court as it was robbed during the incident in question and the photographs recovered from the convict is found to be the photograph of the complainant himself

before the Court, it was possible for the Court to tally the photographs with the photograph that was affixed in the driving licence and then the Court could have accepted the version of the Police Officer because say of this Police Officer gets corroboration from the complainant and other documentary evidence collected during the search of the absconding accused, that is, driving licence.

6.1 It is also argued that discovery Panchnama has not been satisfactorily proved by Prosecution Witness No.5, Mr.Patil, and this case may be a case of simple recovery on the clue given by the accused. The Police has recovered two knives. If one of the knife does not have blood stain then accused can say that he should not be linked with the blood stain knife because it is a joint Panchnama of two accused persons and the irregularity committed by the Police may go against prosecution. But, in the present case, both the knives are found with human blood and serological examination says that both the knives were having blood stain of group 'A' that is, blood found on the clothes of the injured i.e., the

complainant.

7. There is no conflict as to the place of incident. The prosecution has not tried to change the place of occurrence. The Police had recovered blood from the spot with a cotton swab and that cotton swab was also sent for analysis and according to serological examination, the group of blood on that cotton swab was also found of group 'A'. For short, the story of the prosecution is consistent as to the entire event that had occurred at 2:00 a.m., in the morning. The time of the incident was so odd. There may not be large number of people in the area, so the accused could easily escape. Inaction on the part of the Police qua the third absconding person would not make the defence of the present convict-appellant stronger. The prosecution cannot place reliance on the weakness of defence side but when the accused intends to rely on the weakness of the prosecution or some infirmity left by Investigating Agency then the accused is supposed to establish that the lacuna has resulted into serious prejudice to his defence.

8. It is true that in such or similar cases the Police should try to arrange for test identification parade especially when there is no specific description of the accused in the complaint itself then non-conduction of test identification parade would go against the prosecution and identification of the accused in the Court room for the first time, that too, after lapse of several months has no preventive value. In the present case, the arrest of the present convict alongwith absconding accused was incidental as well as accidental. The Police was able to link the accused with the crime collecting other circumstantial evidence like recovery of muddamal, etc. The recovery of Rs.9,750/- cannot be said to be a recovery of a meager amount. Of course, this amount was recovered from the absconding accused but it has come on record that both the accused persons were together and both of them had started to run from the spot on seeing the Police. The Court has therefore only held the accused guilty of the charge applying Section 34 of the Indian Penal Code. When the knife was recovered, at the instance of the

accused, it was found stained with blood group 'A', which was the blood group of the injured complainant. The conduction of test identification parade at the most could have provided more strength to the prosecution. The case of prosecution does not rest only on identification of the accused in the Court room. On the contrary, the Apex Court and this Court in more than one decisions have observed that identification of the accused in the Court room has some bearing. Of course, it is a weak piece of evidence but the same can be considered, if other evidence is available on record which is capable of linking the accused with the crime. There was no reason for the complainant to falsely implicate the accused in the crime so the trial Court has rightly given some weightage to the evidence of the complainant whereby he has identified the accused in the Court during the trial.

9. Having considered the rival side submissions, the Court is of the view that this is a case where the prosecution was under obligation to link the accused with the crime. Though the Panch

Witnesses have not supported the case of prosecution, the learned trial Judge has rightly accepted the version of the Police Officer, Prosecution Witness No.3, Preshkumar Trivedi. He has also explained that why the investigation has been handed over to Mr.Patil in the midst of cross-examination. The Police has recovered two knives and both the knives are found stained with blood of Group 'A' as pointed out by learned A.P.P. The muddamal article No.12, baniyan shown at Sr. No.8, as well as, muddamal article No.6, black pant, shown at Sr.No.6 in Exh.21, are two clothes which were recovered from the absconding accused. The forwarding letter Exh.21 indicates that these clothes were sent to F.S.L. for analysis on 05/03/2003 alongwith both the muddamal knives. These clothes are of absconding accused and both these clothes were found stained with human blood of group 'A' by F.S.L. and it is not possible for this Court to ignore this aspect. The present convict-appellant was in the company of that absconding accused and was arrested simultaneously with that absconding accused and when some important personal article of the person lotted / robbed were

found from the convict-appellant then how the appellant-accused can say that he was innocent and had no concerned with the offence committed. So, when the conduct of the accused of running away on seeing the Police, his presence in the company of the absconding accused against whom the Police has collected more strong incriminating evidence and the present convict was also found in possession with some of the articles which were looted in the incident in question, i.e., wallet, photographs and other papers etc., then these circumstances are consistent to the guilt of the accused and simultaneously it is inconsistent to the innocence of the accused. It is true that in case of circumstantial evidence the prosecution is supposed to establish the link of circumstances but it is also settled legal position that accused can be held guilty only on one single circumstance. Here, more than one circumstances have been brought on record by the Police and they are linking with each other collectively and are capable to link the accused with the crime. The chain is established. On the contrary this Court is of the view that the accused could have

been held guilty of the charge of offence punishable under Section 394 read with Section 34 alongwith absconding accused on the strength of the evidence collected on the date of incident irrespective of the recovery of the muddamal knife. For the sake of argument if the Police had failed in recovery of the muddamal knife even then the accused could have been linked with the offence punishable under Section 394 read with Section 34 of the Indian Penal Code, because the injury found on the body of the person robbed was more relevant than the recovery of the weapon. Here, the Police has recovered the weapon and has also proved the injury. The injury certificate has been received in evidence on admission of the defence side. Some of the Panchanamas have also been received on admission. Now, prosecution if is able to show that the injuries that were inflicted on the complainant were grave in nature then the accused can be linked with the crime for the offence punishable under Section 397 read with Section 34 of the Indian Penal Code. Here, the complainant has stated that the convict was one of the person, who had inflicted the injuries to him, so

the very person could be linked with the offence punishable under Section 397 even individually. The complainant has said that the present accused was one of those three persons who gave him knife blows. For short, non-conduction of test identification parade does not go to the root of the prosecution case and this Court is inclined to observe that conduction of the test identification parade would have provided additional strength to the case of prosecution.

10. It is relevant to note that the day on which two knives were recovered by Police Inspector, Mr.Patil at the instance of the accused or on the clue given by the accused, the injured was taking treatment in the hospital. It was not possible for the Investigating Officer to sprinkle blood on the knife to create the evidence against the accused person after four days, because the incident is of 18th February, 2003 and the knives have been recovered on 22nd February, 2003. So, the say of Mr.Prajapti that some evidence has been created against the accused or he has been falsely implicated in the crime merely because he has started running away with

absconding accused-Akhilesh Sing are not found convincing argument.

11. It is not necessary to reproduce the submission made by learned A.P.P., but it would be sufficient to observe that the submission made by learned A.P.P., requires to be accepted. Some errors which have been mentioned in earlier part of the judgment does not affect the ultimate finding of the Court holding the accused guilty of the charge of offence punishable under Section 397 of the Indian Penal Code.

12. It is not necessary to link the accused with the crime for the offence punishable under Section 394 as he has been found guilty of the charge of offence punishable under Section 397 of the Indian Penal Code. In the same way, the appellant deserves acquittal from the charge of offence punishable under Section 135 of the Bombay Police Act for want of evidence. It is to be observed that there is nothing to held the accused guilty of charge offence punishable under Section 394 of the Indian Penal

Code, as he is found responsible and guilty of more grave charge of offence punishable under Section 397 of the Indian Penal Code individually and jointly with the absconding accused with offence punishable under Section 34 of the Indian Penal Code. The quantum of punishment imposed by the learned trial Judge appears to be adequate punishment in the eye of law. No reduction in the period of substantive sentence requires to be made and order of sentence imposed by the learned trial Judge requires to be upheld.

13. For the aforesaid reasons, the present appeal is partly allowed. The judgment and order of conviction dated 17th June, 2005, passed by the learned Additional Sessions Judge, Court No.17, Ahmedabad City, in Sessions Case No.55 of 2004 is modified and altered. The appellant-accused is acquitted from the charge of offence punishable under Section 135 of the Bombay Police Act. However, the judgment and order of conviction and sentence is hereby upheld so far as offences punishable under Section 397 of the Indian Penal Code. Order and Direction accordingly.

(C.K.BUCH, J.)

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